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December 19, 1996

VIA FEDERAL EXPRESS

Office of the Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

Re: In the Matter of Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996
CC Docket 96-237

Dear Secretary:

Enclosed for filing are an original and sixteen (16) copies of the Comments of the Minnesota Independent Coalition regarding the above-referenced matter. Also enclosed is our affidavit of service.

If you should have any questions regarding the enclosures or other issues with respect to the filing submitted on behalf of the Minnesota Independent Coalition please feel free to contact the undersigned.

Very truly yours,

Richard J. Johnson

RJJ/jdh
Enclosure
cc: Thomas J. Beers (with enclosure)
Scott K. Bergmann (with enclosure)
Kalpak Gude (with enclosure)
International Transcript Services, Inc. (with enclosure)
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In the Matter of	)	
Implementation of Infrastructure	)	CC Docket No. 96-237
Sharing Provisions in the	)	
Telecommunications Act of 1996	)	

SUMMARY OF COMMENTS
OF THE MINNESOTA INDEPENDENT COALITION

The Minnesota Independent Coalition is pleased to respond to the Notice of Proposed Rulemaking released November 22, 1996.

A comparison of Sections 259 and 251 clearly indicates that Section 259 provides a different mechanism than may be available under Section 251 for a "qualifying carrier," as defined in Section 259(d), to obtain "infrastructure, technology , information and telecommunications facilities and functions" from an incumbent LEC. Clearly, Congress intended that interconnections made under Section 259 not impose the duties of a common carrier on the incumbent LEC and not be used by a qualifying carrier to compete with the incumbent LEC. Congress clearly recognized the difference between competitive arrangements, which may be provided under Section 251, and cooperative arrangements intended to foster universal service in non-competitive situations under Section 259.

There is nothing in the Act to give precedence of Section 251 over Section 259, or to make Section 259 available only when Section 251 could not apply. Rather, **a qualifying, non-competitive interconnection request may be made under either Section 251 or Section 259.**

The Commission should not require agreements permitted under the standards of Section 259 to be reviewed under the standards of Section 251. Such review would not serve any purpose, would be absurd and unreasonable (the same agreements could be requested under Section 259 after being invalidated under the standards of Section 251), and would greatly add to the obligations imposed by the Act on the State commissions. Such a result should not be compelled by rules promulgated by the Commission.

Negotiations should be the primary avenue for the development of Section 259 infrastructure sharing arrangements. Discrimination is not a significant issue where arrangements are customized to reflect the unique needs and where the agreements are between non-competing carriers. Section 259 explicitly provides that the development of infrastructure sharing arrangements will not lead to common carrier obligations with respect to those arrangements. The express negation of common carrier duties is very significant because it is the existence of common carrier duties which give rise to requirements of nondiscriminatory treatment.

Rural Telephone Companies should be presumed to be "qualifying carriers." Congress intended to promote universal service through infrastructure sharing for smaller universal service providers. Rural Telephone Companies lack the "economies of scale or scope," qualifying conditions Congress established in Section 259(d)(1). Congress intended to include incumbent Rural Telephone Companies in this category.

State commissions should play the primary role in resolving disputes under Section 259. The State commissions, rather than the Commission, are in a better position to resolve disputes between the parties, because resolution of such disputes will turn heavily upon local circumstances.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In the Matter of	)	
Implementation of Infrastructure	)	CC Docket No. 96-237
Sharing Provisions in the	)	
Telecommunications Act of 1996	)	

COMMENTS OF THE MINNESOTA INDEPENDENT COALITION

The following Comments are submitted by the Minnesota Independent Coalition in response to the Notice of Proposed Rulemaking, released November 22, 1996 ("NPRM"). The Minnesota Independent Coalition is an unincorporated association of over 80 small Rural Telephone Companies, within the meaning of 47 U.S.C. § 153(47), providing telephone exchange service and exchange access service in Minnesota. Although the average size of these Companies is under 3,000 access lines, collectively the members of the Minnesota Independent Coalition provide telephone exchange and exchange access service to over 200,000 access lines in Minnesota.

These comments will address only matters of particular concern to the Rural Telephone Companies in Minnesota.

I. CONGRESS INTENDED THAT SECTION 259 HAVE A DIFFERENT APPLICATION THAN SECTION 251 OF THE ACT.

It is essential that the intent of Congress be reflected in rules promulgated by the Commission under Section 259(a) and (b). A comparison of Sections 259 and 251 clearly indicate that Section 259 provides a <u>different</u> mechanism than may be available under Section

251 for a "qualifying carrier," as defined in Section 259(d), to obtain "infrastructure, technology, information and telecommunications facilities and functions" from an incumbent LEC. For those instances in which a "qualifying carrier" may be able to obtain the same features under either Section 251 or 259, the implications to the incumbent LEC and the requirements under Section 259 are far different than under Section 251.

A review of Section 259 demonstrates that Congress intended that not all agreements between LECs satisfy the criteria of Section 251 and provided an express exemption for agreements between incumbent LECs and "qualifying carriers" (which may be Rural Telephone Companies or CLECs). Qualifying agreements need not meet the requirements of Section 251 and need not be provided by incumbent LECs on a "common carrier basis" [Section 259(3)]. Section 251 is designed to address competitive interactions between carriers, while 259 is designed to address cooperative ventures assisting in the provision of universal service.

A. Section 259 Establishes An Alternative For Qualifying Carriers That Meet Its Criteria.

Section 259 establishes a specialized process under which incumbent LECs must respond to certain requests from qualifying carriers. Section 259(a) reads in part:

> The Commission shall prescribe, within one year after the date of enactment . . . regulations that require incumbent local exchange carriers . . . to make available to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by such qualifying carrier for the purpose of enabling such qualifying carrier to provide telecommunication services, or to provide access to information services, in the service area in which such qualifying carrier has requested and obtained designation as an eligible telecommunications carrier under Section 214(e).

(Emphasis added.) The basic criteria of Section 259 are that the request be: a) from a "qualifying carrier"; and b) to provide telecommunication service or access to information

services in an area where the qualifying carrier has been designated an eligible telecommunications carrier ("ETC"). These criteria are subject to additional limitations, however. Section 259(b) reads in part:

> The regulations prescribed by the Commission pursuant to this Section shall -
>
> . . .
>
> (3) ensure that such local exchange carrier will not be treated by the Commission or any State as a common carrier for hire or as offering common carrier services with respect to any infrastructure, technology, information, facilities, or functions made available to a qualifying carrier in accordance with regulations issued pursuant to this Section;
>
> . . .
>
> (6) not require a local exchange carrier to which this Section applies to engage in any infrastructure sharing agreement for any services or access which are to be provided or offered to consumers by the qualifying carrier in such local exchange carrier's telephone exchange area.

(Emphasis added.) Clearly, Congress intended that requests made under Section 259 **not** impose the duties of a common carrier on the incumbent LEC and **not** be used by a qualifying carrier to compete with the incumbent LEC. In this way, Congress clearly recognized the difference between competitive arrangements, which may be provided under Section 251, and cooperative arrangements intended to foster universal service.

B. Section 251 May Be Used to Obtain Interconnection for Any Purpose.

A comparison of the requirements of Section 259 and 251 demonstrate that, under the Commission's August 8, 1996 First Report and Order on Interconnection ("First Report & Order"), Section 251 may be used by any telecommunications to request interconnection from

non-Rural Telephone Companies for any purpose. The scope of Section 251 includes all of the requests that may be made under Section 259 and many more.

The terms of Section 251(c)(2) impose broad duties on those incumbent LECs subject to its terms and do not limit the uses which can be made by a requesting telecommunications carrier. Section 251(c) reads in part:

> In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:
>
> > (2) [Interconnection] -- The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carriers network/
> >
> > (3) [Unbundled Access] -- The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable and non-discriminatory . . ..

The scope of these obligations is sufficiently broad to include all circumstances covered by Section 259. As noted in the NPRM, Section 251, when applicable, is open to any use by a requesting carrier:

> . . . Section 259(b)(6) does not require incumbent LECs to "engage in any infrastructure sharing agreement for any services or access which are to be provided or offered to consumers by the qualifying carrier in such local exchange carrier's telephone exchange area." No such limitation on the incumbent LEC's obligations appears in Section 251, and, consequently, qualifying carriers would be free, pursuant to the Section 251, to use interconnection and unbundled network elements whether or not they intended to compete in the providing incumbent LEC's telephone exchange area.

At ¶ 14. There is no basis, however, to conclude that Section 251 must be used whenever its terms could apply. ¶ 13. There is nothing in the Act to give precedence of Section 251 over 259

making Section 259 available only when Section 251 could not apply. Rather, a qualifying, non-competitive interconnection request may be made to any incumbent LEC under either Section 251 or 259, whereas competitive requests may be made only to non-Rural Telephone Companies under Section 251(c). (Section 251(c) does not apply to incumbent LECs that are Rural Telephone Companies absent a termination of the exemption pursuant to Section 251(f)(1)).

As a review of Sections 251 and 259 makes clear, the key distinction in applying the two provisions is whether the requested use is for competitive or noncompetitive purposes.

C. The Non-Competitive Requirement of Section 259 Does Not Infer Exclusivity and Provides an Alternative to Qualifying Carriers.

The NPRM requests comment on the question of whether Section 259 provides an exclusive remedy, when available. ¶ 11. To the contrary, there is no indication in either Section 251 or 259 that Section 259 provides an exclusive approach for a qualifying carrier when available. Rather, under the First Report and Order, a qualifying carrier may select between Section 251, where available, and 259 where the requirements of Section 259 are met because there are no limitations on the uses that may be requested under Section 251. See ¶ 11.

Even under the Commission's interpretation making non-competing LEC to LEC interconnections subject to Section 251, Congress intended to provide an option to qualifying carriers whether to request services under Sections 251 or 259. It is not for the Commission to give or withhold such an option. See ¶ 13.

Promotion of competition does not justify rewriting the terms of the Act. See ¶ 14. Even if competition could be promoted by limiting the use of Section 259, such an approach would violate the intent of Congress. The preservation of antitrust remedies to arrangements made

under Section 259 also indicates that such a further limitation by the Commission is unnecessary and was not intended by Congress. (See Report of Conference Committee to Section 259).

Therefore, Section 251 should be applied to address competitive arrangements or when selected by the qualifying carrier for a noncompetitive arrangement. Section 259 should apply where a qualifying carrier chooses to use that approach to obtain services in a noncompetitive situation (to meet the needs of customers outside the Incumbent LEC's exchange areas).

D. A Requirement That All Agreements Between LECs, Including Agreements Between Incumbents and Qualifying Carriers, Meet the Requirements of Section 251 Would Violate the Terms of Section 259.

The NPRM requests comment on the effect of Section 259 on the Commission's earlier determination that all agreements between LECs existing as of the date of the Act must be reviewed under the standards of Section 251. See ¶ 28. The NPRM notes that these requirements were not stayed. See Footnote 51.

Although these requirements were not stayed, it is clear that some agreements between LECs involve agreements that would meet the requirements of Section 259 if requested by a qualifying LEC under the regulations to be promulgated under this NPRM. As a result, an agreement between an incumbent LEC and a Rural Telephone Company or between two Rural Telephone Companies, which could be invalid under the standards of Section 251, could be fully justified under Section 259. Moreover, such agreements, absent a termination of the exemption from Section 251(c), are not even subject to the interconnection provisions of Section 251. It is important that existing agreements that qualify under Section 259 not be subjected to the State commission review required of Section 251 agreements for several reasons.

First, agreements between an incumbent LEC and a qualifying LEC are not subject to common carrier obligations. As a result, there is little justification for reviewing such

agreements under Section 252(e), the principal purpose of which is to determine whether the agreements are discriminatory and, upon completing the review, to make the agreements available to other carriers [Section 252(i)]. Neither purpose is applicable to an agreement that is not subject to common carrier obligations, as provided under Section 259.

Second, requiring review of the thousands of existing arrangements that currently exist within each state would be extremely burdensome and would impede the ability of State commissions to satisfy their other obligations under the Act.

Third, requiring a review (and possible rejection) under Section 252 and with later reinstatement of the agreement under Section 259 would be absurd and unreasonable, and should not be compelled by rules promulgated by the Commission.

Accordingly, the Commission should not require agreements permitted under the standards of Section 259 to be reviewed under the standards of Section 251. Such review would not serve any purpose and would greatly add to the obligations imposed by the Act on the State commissions

II. NEGOTIATIONS SHOULD BE THE PRIMARY VEHICLE FOR IMPLEMENTATION OF INFRASTRUCTURE SHARING.

The NPRM requests comment regarding the overall approach to be taken by the Commission in implementing Section 259. The NPRM reads in part:

> We also tentatively conclude that the best way for the Commission to implement Section 259, overall, is to articulate general rules and guidelines. We believe that Section 259-derived arrangements should be largely the product of negotiations among parties. We seek comment on these tentative conclusions and the desirability of such an approach to implementing Section 259.

These observations are appropriate and should be reflected in the Commission's rules. Negotiations should be the primary avenue for the development of Section 259 infrastructure sharing arrangements.

A. Discrimination in Non-Competitive, Non-Common Carrier Arrangements is Not a Significant Risk.

It is probable that most infrastructure sharing arrangements will reflect the unique needs of the qualifying carrier and the technology available from the incumbent LEC. Discrimination is not a significant issue where arrangements are customized to reflect the unique needs and where the agreements are between noncompeting carriers.

The Commission requested comment as to whether there is an "inherent nondiscrimination principle" applicable to infrastructure sharing arrangements arising from the availability of such arrangements "to any qualifying carrier". ¶ 22. To the contrary, Section 259 explicitly provides that the development of infrastructure sharing arrangements will not lead to common carrier obligations with respect to those arrangements. Section 259(b) reads in part:

> The regulations prescribed by the Commission pursuant to this section shall --
>
> . . .
>
> (3) ensure that such local exchange carrier will not be treated by the Commission or any state as a common carrier for hire or as offering common carrier services with respect to any infrastructure, . . . made available to a qualifying carrier . . ..

The express negation of common carrier duties is very significant, because common carrier duties give rise to most nondiscrimination requirements.

B. Definitive Rules for Infrastructure Sharing Would Not be Helpful.

The NPRM also asks whether definitive rules that attempt to minimize potential disputes would be appropriate. ¶ 17. The adoption of definitive rules would be at odds with the reliance upon negotiations as the primary vehicle for implementing infrastructure sharing. While definitive rules might minimize disputes, they would also minimize opportunities for parties to craft arrangements that are appropriate for their specific circumstances.

The Commission also sought comment on whether terms and conditions should be established or "whether the parties themselves and the State commissions are better suited to establish such provisions." ¶ 24. Because of the unique needs of qualifying carriers and the absence of common carrier duties for incumbent LECs, it is clear that the parties themselves will be in the best position to make arrangements. The existence of the multitude of current interconnection arrangements between non-competing LECs without the existence of guidelines or regulated terms and conditions is ample proof that such regulatory management is not justified. Indeed it is probable that "national rules" would do more to develop barriers to infrastructure sharing than to resolve such barriers.

C. Good Faith Negotiations Standards are not Necessary.

The NPRM also asks whether or not a "good faith negotiation standard" should be established by either the Commission or by the States. ¶ 25. Because there is a specific requirement that infrastructure sharing arrangements not be used to compete with the incumbent LECs, it is unnecessary to establish a good faith negotiation standard. The need to impose an obligation to negotiate would arise only if the incumbent LEC were required to provide facilities at a loss. Section 259(b)(1) expressly states that an incumbent LEC need not take any action that

is "economically unreasonable." This provision assures that voluntary arrangements will work, just as they have worked between non-competing LECs for decades.

D. Termination Provisions Should be Negotiated by the Parties.

Finally, the NPRM asks whether termination of an infrastructure sharing agreement for breach would be an appropriate remedy, and whether such an arrangement should be adjudicated by the Commission. ¶ 27. Termination for breach is a common remedy in commercial contracts with which the parties will be generally familiar.

The specific notice of termination and the appropriateness of providing a period of time to cure a breach will depend on the nature of the breach, the difficulties the offending party would have in providing replacement facilities, and the importance of the facilities to the provision of universal service. Because of the complexity of the issue, the parties should be allowed to negotiate the appropriate provisions rather than imposing fixed terms through regulation.

In conclusion, just as non-competing LECs have successfully developed the existing interconnecting telecommunications network without Federal rules directing the terms of such arrangements, future qualifying arrangements should be left to the affected parties. The availability of State commission review of any disputes, as discussed further below, will protect the public interest and assure the implementation of Section 259.

III. QUALIFYING CARRIERS SHOULD BE DEFINED TO INCLUDED RURAL TELEPHONE COMPANIES.

The NPRM requests comment on whether there should be a presumption that Rural Telephone Companies are also qualifying carriers. ¶ 37. Clearly, Rural Telephone Companies should be presumed to be "qualifying carriers".

Rural Telephone Companies lack the "economies of scale or scope", qualifying conditions Congress established by Section 259(d)(1). By imposing those qualifying conditions, Congress intended to promote universal service through infrastructure sharing for those smaller universal service providers which lack the economic characteristics to most efficiently provide all of their own infrastructure. ¶ 12.

There are strong indications that Congress intended to include incumbent Rural LECs in this category. Qualifying carriers must be both "eligible telecommunications carriers" and lack "economies of scale or scope". It seems likely that Rural LECs will constitute the majority of companies that meet these unique criteria. Further, it is not clear that there will be other ETC's in Rural LEC areas, given the restrictions of Section 214(e) on designation of additional eligible telecommunications carriers in Rural LEC areas.

Qualifying carriers should be determined by their economic power, which is demonstrated in size. ¶ 37. Congress has expressly recognized the need for special treatment for smaller LECs through the various provisions applicable to Rural Telephone Companies and through the availability of suspensions and modifications (under Section 251(f)(2)) for companies with less than 2 percent of the nation's access lines. A similar test should be applied to Section 259. Rural Telephone Companies should automatically qualify.

There is no indication that Congress intended to limit Section 259 to adjacent LECs, and some technologies that obviously should be subject to infrastructure sharing, such as advanced CLASS features and SS-7 signaling, may be provided over substantial distances. ¶ 12.

Determination of qualification of a particular project should not be based upon the relative cost of investments, because such costs will be extremely difficult to determine. Further, a large carrier, such as an RBOC, AT&T or MCI, does not lack "economies of scale or scope"

even if a particular project could be provided at a lower cost through infrastructure sharing with an incumbent LEC. ¶ 37.

Accordingly, Rural Telephone Companies should be presumed to be qualifying carriers. Rules for implementation should be kept simple and straight forward.

IV. STATE COMMISSIONS SHOULD PLAY THE PRIMARY ROLE IN RESOLVING DISPUTES.

State commissions should play the primary role in resolving disputes for two reasons.

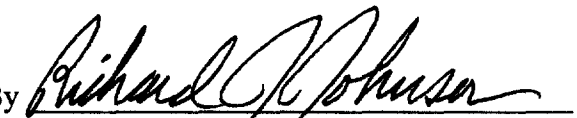
First, the individual characteristics of the qualifying carrier, its needs, and the services available from incumbent LEC may vary widely based upon individual, local circumstances. The State commissions, rather than the Commission, are in a far better position to resolve disputes between the parties, because resolution of such disputes will turn heavily upon local circumstances. Accordingly, disputes should be adjudicated by States, not the Commission. ¶ 27.

Second, a limited role for the States is not supported by the Act. ¶ 18. While the Commission is empowered to issue regulations, Section 259(b)(7) requires that all infrastructure agreements be filed with the State commissions. This is a clear indication that Congress intends the State commissions to be responsible for resolving any interconnection disputes, since filing with the States would serve little other purpose.

For these reasons, the Commission should not become involved in resolving disputes between carriers. Rather, the State commissions should resolve those disputes under the guidelines set forth in Section 259 and the Commission's regulations implementing Section 259.

Dated: December 19, 1996

Respectfully submitted,

By 

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